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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-703

UNITED STATES OF AMERICA, APPELLANT

v.

FIRST NATIONAL BANCORPORATION, INC. AND THE FIRST NATIONAL BANK OF GREELEY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

BRIEF FOR THE UNITED STATES

OPINION BELOW

The memorandum opinion and order of the district court (J.S., App. A, pp. 26-61) is reported at 329 F. Supp. 1003.

JURISDICTION

The memorandum opinion and order of the district court was filed on July 12, 1971. On August 27, 1971, the district court entered an order denying plaintiff's timely motion, under F.R. Civ. P. 52(b) and 59, to reopen the record, to obtain additional findings of fact and conclusions of law, and to obtain the relief re-

quested in the complaint (J.S., App. B, p. 62). The United States filed a notice of appeal to this Court on September 24, 1971 (J.S., App. C, p. 63). Probable jurisdiction was noted on February 22, 1972. The jurisdiction of the Court is conferred by Section 2 of the Expediting Act (15 U.S.C. 29). *United States* v. *Phillipsburg National Bank*, 399 U.S. 350; *United States* v. *Third National Bank in Nashville*, 390 U.S. 171.

QUESTIONS PRESENTED

1. Whether acquisition of a leading bank in a concentrated local market in Colorado by one of the largest holding companies in the state violates Section 7 of the Clayton Act by eliminating the potential competition of the acquiring firm and by contributing to the statewide trend toward domination of commercial banking by a few large holding companies.

2. Whether acquisition of the second largest bank in Greeley, Colorado, by the second largest bank holding company based in Denver, Colorado, may substantially lessen competition among Denver banks offering correspondent banking services to Colorado "country banks" by contributing to the trend toward foreclosure of outlets for such services in the state.

STATUTES INVOLVED

Section 7 of the Clayton Act, 38 Stat. 731, as amended, 64 Stat. 1125, 15 U.S.C. 18, provides in pertinent part:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other

> share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

* * * * *

Section 3(*c*) of the Bank Holding Company Act of 1956, 70 Stat. 134, as amended, 80 Stat. 237, 12 U.S.C. 1842(*c*), provides in pertinent part:

> The [Federal Reserve] Board shall not approve—
>
> * * * * *
>
> (2) any other proposed acquisition or merger or consolidation under this section whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint or[1] trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.
>
> In every case, the Board shall take into consideration the financial and managerial resources and future prospects of the company or companies and the banks concerned, and the convenience and needs of the commmunity to be served.

[1] So in orginal.

STATEMENT

This is a direct appeal from the judgment of the United States District Court for the District of Colorado, dismissing a complaint by the United States alleging that the acquisition by the second largest bank holding company in the State of Colorado, First National Bancorporation ("Bancorporation"), of The First National Bank of Greeley ("FNB Greeley"), the largest independent bank and the second largest commercial bank in Greeley, Colorado, violated Section 7 of the Clayton Act.

A. THE STRUCTURE OF BANKING IN COLORADO

It is agreed that, insofar as this case involves potential competition, the relevant product market is, as the district court found (J.S. App. A, pp. 41–43), "commercial banking."[2]

Denver is the banking, commercial and financial center of Colorado (see App. 219–221).[3] It has almost a quarter of the State's population and almost half of the State's bank deposits (compare PX 21, App. 782, and DX 32, App. 1670). Bancorporation's principal subsidiary, the First National Bank of Denver ("FNB Denver") is the largest bank in the city; it

[2] The court found it unnecessary to make any finding about product market in resolving the separate question relating to correspondent banking services (see n. 20, *infra*).

[3] "App." references are to the printed appendix in this Court; "PX" references are to plaintiff-appellant's exhibits introduced in the district court; "DX" references are to defendants-appellees' exhibits in the district court.

had 25.3 percent of the deposits in Denver County in December 1969 (PX 21, App. 782).

There are also other significant banking markets in Colorado, which are located in the other population centers of the State—Colorado Springs, Boulder, Fort Collins, Pueblo, and Greeley. All of these cities are located along the Rocky Mountain front, north and south of Denver.

Colorado prohibits branch banking,[4] but does not prohibit common ownership of two or more separate banks by a holding company.

In the 1960's the leading Colorado banks began to form holding companies to bring local banks across the state under common control (PX 4, App. 534–535). In 1960, there was one holding company operating in Colorado—an out-of-state firm, Western Bancorporation—which operated three subsidiary banks in Colorado accounting for 4.4 percent of total Colorado deposits.[5] By 1970, there were seven such companies, which together operated 41 subsidiary banks throughout the state (J.S. App. A, n. 35), including 13[6] of the 27 banks outside of Denver that had June 1970 deposits of more than $20 million (PX 125, App. 1157). By concentrating on the acquisition of local market leaders in Colorado's most significant banking markets (DX 3, App. 1371–1372), these seven companies by 1970 had obtained 51 percent of the

[4] Colo. Rev. Stat. 1963, § 14–3–1 (1969).

[5] As an out-of-state holding company, Western Bancorporation was barred by the Bank Holding Company Act of 1956 from further expansion in Colorado. 12 U.S.C. 1842(d).

[6] This includes the post-trial acquisition of National State Bank of Boulder by Bancorporation. See n. 9 *infra*.

State's total deposits,[7] although they owned less than one-fifth of all Colorado banks. As a result, despite an increase in the absolute number of banks and banking organizations in Colorado between 1960 and 1970 (DX 28, App. 1653–1660), there has been a trend toward control by a few large holding companies of the leading banks in local market areas (see n. 28, *infra*, and accompanying text at pp. 24–25).

B. THE ACQUIRING HOLDING COMPANY

Bancorporation is a registered bank holding company. It was organized by the state's largest bank, First National Bank of Denver ("FNB Denver"), to combine FNB Denver as its lead bank with three smaller Denver banks that had been organized *de novo* by principals of FNB Denver (PX 3, App. 513; PX 4, App. 534–535; PX 5, App. 552–554; PX 6, App. 557–561). In June 1970, FNB Denver had total deposits of $468.0 million (12.3 percent of total deposits held by Colorado commercial banks); it had total assets of $586.5 million, and loans and discounts of $340.8 million (J.S., App. A, pp. 29–30). Moreover, FNB Denver is the largest of the six Denver banks offering a full range of correspondent banking service to smaller Colorado banks.[8] As of August 1970, it had

[7] Computed from PX 115, App. 1144–1145, and DX 28, App. 1653–1660.

[8] Because of Denver's political, social, and economic significance in the state and region, smaller "country" banks throughout the state rely upon six downtown Denver banks to supply their primary needs for large bank services. These inter-bank operations are known as correspondent banking services, which include such things as check clearing, overline loans, advice on local banking regulations, international transactions, and a growing number of financial and bank-related services.

more than 37 percent of the Colorado interbank deposits held by these six banks, as compared to approximately 23 percent held by each of the two next largest banks (PX 204, App. 1303; PX 205, App. 1304; see also App. 247–248).

At the time of its organization, Bancorporation stated in its first annual report (PX 3, App. 513):

> The policy of our company is to expand as rapidly and as wisely as possible through the acquisition of other banks in Colorado (preferably banks in those growth areas where Bancorporation may make the most significant contribution to Colorado's economy and concurrently generate the highest profits for its shareholders) and through other legally permissible investments and activities.

Bancorporation has vigorously pursued this policy by attempting to enter all but one of the state's six most significant markets. Its proposed acquisition of FNB Greeley was the first of six applications filed by the holding company between 1969 and 1971 seeking regulatory permission to acquire important banks in various Colorado local banking markets.[9] Its six applica-

[9] In addition to the three applications discussed at n. 28, *infra*, Bancorporation has had two others. The Federal Reserve Board denied its application to acquire the only bank in the rapidly expanding Montbello section of Denver (DX 52, App. 1750–1759); it approved its acquisition of the second largest bank in Boulder. In the latter instance the government did not bring suit because the acquired bank was in serious financial difficulties. *In the Matter of First National Bancorporation, Inc.*, 57 Fed. Res. Bull. 613. It also recently acquired a small bank in East Colorado Springs. Fed. Res. Bd. Order, April 26, 1972.

tions involved banks with total deposits of $217.2 million (DX 1, App. 1329–1336); these included the state's eighth, ninth and fifteenth largest banks (PX 123, App. 1155), which were the third, fourth and ninth largest banks outside Denver (PX 125, App. 1157). The holding company has other proposals under active consideration (PX 241, App. 1323–1328; see also PX 4, App. 535–536; PX 6, App. 561–564; App. 286).

C. THE LOCAL GEOGRAPHIC MARKET

The district court found that the relevant geographic market for purposes of determining the effect of the present acquisition on potential competition is the so-called "Greeley Area," consisting of the City of Greeley, Colorado, and the adjacent communities of Evans, LaSalle, Peckham, Kersey, Gill, Eaton, Lucerne, Farmers and Bracewell (J.S., App. A, pp. 32, 43–47).[10] Appellees have not challenged this finding.

The City of Greeley is located approximately 50 miles north of Denver in Weld County; it is the county seat (J.S., App. A, p. 29; App. 37). The Greeley Area is presently undergoing rapid development; in the past decade it has grown substantially, while the entire economy of Weld County, previously agri-

[10] With respect to the effect of this acquisition on actual competition among Denver-based banks for correspondent banking services, the court found it unnecessary to decide the relevant geographic market (see n. 20, *infra*).

cultural, has experienced a healthy diversification (App. 74–75).[11]

The population of the Greeley Area increased from 45,228 to 58,500 between 1960 and 1970, an increase of 29.3 percent (PX 98, App. 1126). Most of this increase occurred within the City of Greeley, where the expansion was 47.8 percent (PX 88, App. 1118). Economic growth during the period was even more significant. For example, the consumption of electric power and of natural gas increased 115.8 percent (PX 101, App. 1127) and 127.3 percent (PX 100, App. 1127), respectively; and the number of main telephones went up 48.2 percent (PX 99, App. 1126). Retail sales for Greeley—which is Weld County's trade and government center (App. 37–39)—were up 97.1 percent (PX 91, App. 1121), while gross sales rose 281.8 percent (PX 90, App. 1120). Moreover, personal income in Weld County increased from $119.5 million in 1959 to $212 million in 1968 (PX 103, App. 1128).[12]

[11] Between 1950 and 1968, Weld County continued to be one of the nation's top ten agricultural counties. But farm earnings, which accounted for 49.2 percent of the total personal income at the beginning of this period accounted for only 28.3 percent at the end. In the same period, earnings from manufacturing increased from 4.1 percent to 11.1 percent (J.S., App. A, p. 34, n. 4; PX 104, App. 1129–1130).

[12] Since three-fourths of Weld County's population growth is attributable to the City of Greeley (PX 88, App. 1118), presumably a similarly disproportionate share of the county's growth is personal income which was earned by Greeley residents.

D. THE ACQUIRED BANK AND THE STRUCTURE OF BANKING IN GREELEY

Within the Greeley Area, six separate banking organizations operate eight banking offices of varying size. Their relative market shares appear in tabular form at J.S., App. A, p. 33. The acquired bank, FNB Greeley, is the community's largest independent bank, and its second largest banking organization (J.S., App. A, pp. 32, 48). It is also Colorado's fifteenth largest bank in terms of total deposits, and ranks twelfth in the state in terms of total loans and discounts (J.S., App. A, p. 31). It has total deposits of $39.2 million, constituting 33.9 percent of the total deposits for the city, and 31.8 percent of the total deposits for the Greeley Area (J.S., App. A, p. 32). At the time of the proposed acquisition, the total assets of FNB Greeley were $47.7 million; its outstanding loans were $28.9 million, or 32.6 percent of the Greeley Area total (PX 73, App. 1097; PX 78, App. 1102).

The largest banking organization in the Greeley Area is Affiliated Bankshares of Colorado, Inc., ("ABC"). It owns three banking institutions there, the combined deposits of which total $49.6 million, or 42.9 percent of the total deposits for the city and 40.2 of the total deposits for the area (J.S., App. A, p. 33; PX 74, App. 1098). ABC's principal local subsidiary, Greeley National Bank, is almost the same size as the acquired bank (PX 73–86, App. 1097–1116; PX 114–118, App. 1142–1151; and see App. 77–78).

The third largest banking organization operating in the Greeley Area, United Bank of Greeley ("UB

Greeley"), is a subsidiary of United Banks of Colorado ("United"), the state's largest holding company (PX 114–118, App. 1142–1151). UB Greeley has $24.7 million in deposits, which are 21.4 percent of the total deposits for the city and 20 percent of the total deposits for the area (J.S., App. A, p. 33).

Together, the acquired bank, ABC and UB Greeley, have 98.2 percent of total deposits in the City of Greeley, and 92 percent of deposits in the Greeley Area (J.S., App. A, pp. 32–33).[13]

None of Bancorporation's subsidiaries competes directly with Greeley Area banks for local business, but the acquiring holding company has maintained a presence in the area through a loan-production office operated by its lead bank, FNB Denver (PX 4, App. 538–539; PX 40, App. 952–953). It has made a number of large loans in the area (PX 48, App. 1057–1058), does some trust business there (PX 37), and has solicited business in the area (PX 38).

Bancorporation is the largest Colorado holding company not already in the Greeley Area (App. 75–76). Of the three remaining holding companies in the state not operating in the area at the time of trial, only two appear capable of competitively significant entry; the third has a total combined deposit figure which amounts to less than the deposits held by the

[13] The only other bank in the City of Greeley, State Bank of Greeley, is a commercial bank (App. 277) with less than 2 percent of local deposits (J.S., App. A. p. 33). There are two additional banks in the Greeley Area, which combined have slightly more than 6 percent of the area's total deposits (*ibid.*).

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acquired bank (*ibid.*; Compare J.S., App. A, pp. 35–36, n. 5, with PX 74, App. 1098).[14]

E. THE PROCEEDINGS

On July 9, 1969, Bancorporation applied to the Federal Reserve Board, pursuant to Section 3(a)(3) of the Bank Holding Company Act of 1956 (70 Stat. 134, as amended, 84 Stat. 1763, 12 U.S.C. 1842(a)(3)), for approval of the proposed acquisition of FNB Greeley. The Comptroller of the Currency recommended approval, but the Department of Justice advised the Board that it believed the combination "would have a significantly adverse effect on competition" (DX 48, App. 1718). The Board approved the application by a four-to-three vote on June 9, 1970.[15]

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[14] Those three holding companies are: Colorado CNB Bankshares, with combined deposits of $281.3 million; First Colorado Bankshares, with combined deposits of $120.4 million; Central Colorado Bancorporation, with combined deposits of $36 million (J.S., App. A, pp. 35–36, n. 5). Mountain Banks, Ltd., the new holding company formed since trial which owns two of the banks Bancorporation proposed to acquire (see n. 28, *infra*), has combined deposits of $182.5 million. *Mountain Banks, Ltd.*, 58 Fed. Res. Bull. 315.

[15] The majority, while recognizing that Bancorporation had the capacity for *de novo* or foothold entry into Greeley, concluded that the banking market there was not so concentrated that Bancorporation should be limited to these alternatives (DX 48, pp. 1718–1719). The existence of a non-Denver bank holding company, (Affiliated Bankshares of Colorado, Inc.) in the area, it felt (DX 48, App. 1719–1720), assured sufficient market diversity to prevent increased "parallelism" in the Greeley Area. Nor did it consider particularly relevant the fact that Bancorporation's application was but one of several by Colorado holding companies across the state; the impact of each proposed acquisition on the state's banking structure must be

The United States filed this civil antitrust action on July 8, 1970, thereby automatically staying consummation of the acquisition under Section 11(b) of the Bank Holding Company Act of 1956 (70 Stat. 138, as amended, 80 Stat. 240, 12 U.S.C. 1849(b)).[16] It claimed that the acquisition would substantially lessen competition by (1) eliminating Bancorporation as a potential entrant into the Greeley Area, (2) removing it as an external influence on the relevant market, and (3) contributing to the trend toward dominance of the state's banking institutions by a few large holding companies. In an amended complaint (App. 20–26), the United States further alleged that the acquisition would eliminate actual competition by foreclosure of FNB Greeley as a customer for the correspondent banking services in Colorado, offered by six Denver banks; and that this would contribute to the trend

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considered solely on its individual merits, the majority concluded (DX 48, App. 1719).

The three dissenting members deemed the proposed acquisition to be anticompetitive (DX 48, App. 1725–1728). In their view, the effect of the majority's approval is to permit Bancorporation, upon a minimal showing, to enter by acquisition into a market that is attractive for *de novo* entry, under circumstances where its existing presence could be expected to expand into a full service operation in competition with existing banks. They argued that the adverse impact of such a determination is accentuated by the ongoing holding company movement, which threatens to concentrate in the hands of a few the control of a large percentage of the banking institutions in Colorado's six most significant banking markets (Denver, Colorado Springs, Boulder, Fort Collins, Greeley, and Pueblo). The time to stop this trend, they concluded, is now.

[16] On October 4, 1971, Mr. Justice White continued the stay pending disposition of this appeal.

toward foreclosure of a substantial portion of the market for correspondent banking services due to holding company ownership of both supplier and customer banks.

Following a trial on the merits, the district court dismissed the complaint. It ruled that the government had failed to show that the effect of the acquisition "would be substantially to lessen competition" (J.S., App. A, p. 47). It discounted as "future horribles" (*id.* at p. 52) the government's evidence of a trend in Colorado toward the acquisition by statewide holding companies of leading banks in separate local markets. Instead, noting that this was Bancorporation's first attempt to expand beyond the Denver metropolitan area," the court focused only on the competitive impact of this acquisition on banking in the Greeley Area.

First, the court found that Bancorporation was not a potential *de novo* entrant into the relevant market. Relying solely upon figures showing comparisons of population per banking office (J.S., App. A, p. 49), it determined that neither the Greeley Area nor Weld County was "underbanked." Bancorporation offi-

"The court stated that "* * * this is the first effort on the part of the Government to halt the trend of acquisitions. It did not choose to intervene until after the United Banks of Colorado and Affiliated Bankshares had both entered the Greeley Area" (J.S., App. A, p. 37).

"While Greeley's ratio of 6,484 persons per bank office is less than the 9,854 ratio for the state, it is larger than the national figure of 5,751 (J.S., App. A, p. 49). Moreover, the addition of a seventh bank based on 1970 population figures would draw the ratio down to 5,557, or slightly less than the national

cials, it pointed out, had denied any intention to enter the Greeley Area other than by acquisition of FNB Greeley. Moreover, "objective" evidence showing that Greeley's growth was only "moderate," and that the appropriate banking agencies would not now permit *de novo* entry, seemed, in the court's view, to give substance to these denials. Consequently, while recognizing Bancorporation's financial capability for *de novo* entry, it concluded that "the practical difficulties, together with the expense, argue against Bancorporation's following this route" (J.S., App. A, p. 50).

The possibility that Bancorporation would make a "foothold" acquisition of Greeley's smallest bank[18] was dismissed as unlikely under "the objective evidence presented" (J.S., App. A, p. 50); the court did not discuss, however, the other two "foothold" possibilities in the larger Greeley Area with respect to which the government had introduced evidence (see, *e.g.*, PX 73–83, App. 1097–1107).

The court also concluded that there was little evidence demonstrating that Bancorporation was an existing influence in the market by its presence in the "wings" (J.S., App. A, pp. 50–51).

Finally, the district court rejected the government's argument that this acquisition would effect an anticompetitive foreclosure of FNB Greeley as a customer for Denver-based correspondent banking serv-

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average. Among the several states, these ratios range from a statewide average low of 2.591 for South Dakota to a high of 13.479 for Florida (DX 22, App. 1623–1624). Colorado's ratio is the second highest in the nation (*ibid.*).

[18] See n. 25, *infra*, p. 22.

ices. It held that the 1.2 percent [19] foreclosure claimed by the government was insubstantial.[20] The court distinguished cases holding similarly small market foreclosure percentages to be anticompetitive on the ground that they involved national markets in other industries (J.S., App. A, p. 60).[21]

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[19] The district court accepted this figure only *arguendo*. First, it found questionable the government's reliance on interbank deposits as an acceptable measure of market shares in the correspondent banking market; it pointed out that wide variations in the amount of uncollected funds in deposit accounts distort the sums actually available for investment by the correspondent banks. Second, the court found that the government's market was improperly restricted to the interbank deposits of Colorado banks held by six Denver correspondent banks (J.S., App. A, pp. 58–59).

[20] In light of this finding, the court found it unnecessary to decide whether Denver-based correspondent banking is an appropriate "line of commerce," and whether Colorado is an appropriate "geographic market" or "submarket" (J.S., App. A, pp. 53–58).

[21] On August 27, 1971, the district court denied the government's timely motion to reopen the record, to obtain additional findings of fact, and to obtain the relief requested in the complaint (J.S., App. B, p. 62). The purpose of the motion was to place in evidence post-trial developments in Colorado banking, which, in the government's view, show that firms to which the merger route is barred as potential competitors often become actual competitors. The developments included United's decision to acquire a much smaller bank in Colorado Springs after the government's suit interrupted its effort to purchase that city's third largest bank (App. 2001–2003; PX 244–245, App. 2022–2029), and the formation of a new holding company around two of the banks that Bancorporation unsuccessfully attempted to acquire in Colorado Springs and Pueblo (App. 1997–2001; see n. 28, *infra*).

In denying this motion the district court ruled that the evidence pertaining to the holding company formation was not newly discovered and that in the interest of finality it should not be the basis for granting the relief requested (App. 2007). It permitted the government to present its evidence, however, so that it could

ARGUMENT

INTRODUCTION AND SUMMARY

The structure of the banking business in the United States is presently undergoing significant changes. With the relatively recent emergence of the bank holding company movement, and, where permitted by state law, the branch banking movement, there now exists the potential for substantially-increased competition in commercial banking through new entry into previously static local banking markets. But these expansive movements also present serious risks for future competition in this vital sector of the economy.

The ultimate effect that this expansion will have on the competitiveness of the banking business in this country will depend largely on the method by which banking organizations are permitted to expand. When, for example, entry into new markets is accomplished independently or through the acquisition of a small bank as a foothold from which to compete for a greater market share, the local markets affected become the arena for greater competition. On the other hand, when banking organizations extend their markets by acquiring leading local banks in significant banking areas throughout a state, the potential competitive benefits of their entry are lost; they simply succeed to the share of the acquired institution and, in

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be utilized in this appeal (*ibid.*). With respect to United's decision to attempt entry into Colorado Springs by acquiring a small bank, the court found it to be without probative value in the present case; it found that "Bancorporation would not go into Greeley on any foothold basis" (App. 2007–2008).

many instances, eliminate strong independent locally-oriented banking competitors in the local markets.

In many states, continued expansion by a few banking organizations in the manner last described has recently resulted, or threatens to result, in a concentration of the statewide banking business in a few of the largest and most acquisitive organizations.[22] The situation in Colorado is a good example. There, the trend toward concentration has rapidly accelerated, with Denver-based holding companies endeavoring to acquire control of established institutions which have large market shares in the state's more important local banking markets. This form of acquisition is known as a market extension—*i.e.*, the entry of a firm into a new geographic market by acquisition of a firm already doing business there. While it does not change existing market shares, it may well have a significant effect on market structure and behavior by eliminating the potential competition of the acquiring organization.

This case involves the legal criteria by which the substantiality of such an effect is to be determined in market-extension acquisitions by banking organizations; it raises squarely the question of the extent to which Section 7 of the Clayton Act forbids this developing domination by large banking organizations of a substantial percentage of the banking business in a particular state. For, as we have noted, the state boundaries form the legal arena to which banking ex-

[22] See Board of Governors of the Federal Reserve System, *Recent Changes in the Structure of Commercial Banking*, 56 Fed. Res. Bull. 195, 205–208 (1970), for recent statewide changes in concentration.

pansion is limited, and from which out-of-state banks are excluded.

The preservation of competition in banking has been a matter of recent concern to Congress. Both in the Bank Merger Act of 1966, 12 U.S.C. 1828(c)(7)(D), and in the 1966 amendment to the Bank Holding Company Act, 12 U.S.C. 1842(c), Congress barred federal regulatory approval of bank acquisitions which would violate the antitrust prohibitions of Section 7 of the Clayton Act unless "the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served." It directed the federal courts to follow the same standard. See *e.g., United States* v. *Phillipsburg National Bank*, 399 U.S. 350; *United States* v. *Third National Bank in Nashville*, 390 U.S. 171; *United States* v. *First City National Bank of Houston*, 386 U.S. 361.

In resolving the question relating to potential competition in this case, the district court erroneously required the government to prove that competition "would be" lessened (J.S., App. A, p. 47), rather than looking to whether the effect of the questioned acquisition "may be substantially to lessen competition or tend to create a monopoly," as required by Section 7. Moreover, it applied subjective rather than objective criteria in determining the substantiality of the acquiring bank's role as a potential competitor; it failed to give due weight to existing concentration in the Greeley Area; and it ignored the relationship between

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this particular acquisition and the undisputed trend toward concentration throughout the state.

Finally, the district court erred in failing to recognize that the elimination of the acquired bank as a customer for correspondent banking services in Colorado may substantially lessen actual competition in the state's correspondent banking market. In evaluating this question, the court considered the FNB Greeley acquisition in isolation, without regard to the trend in Colorado toward foreclosure of the correspondent banking market through large bank holding company acquisitions. This Court and other courts have recognized that where a trend toward substantial foreclosure is present, acquisitions of relatively small market segments, such as the 1.2 percent involved here, are significant. See *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 332–334.

I. THE EFFECT OF THE PROPOSED ACQUISITION MAY BE SUBSTANTIALLY TO LESSEN COMPETITION IN COMMERCIAL BANKING IN THE GREELEY AREA BY ELIMINATING THE SIGNIFICANT POTENTIAL COMPETITION THAT THE ACQUIRING BANK HOLDING COMPANY PROVIDED IN THAT AREA

A. An Acquisition That Eliminates Significant Potential Competition in Banking May Substantially Lessen Competition within the Meaning of Section 7 of the Clayton Act.

In a market with many firms of roughly comparable size and strength, internal competition can be generally relied upon to keep down prices, to promote efficiency, and to encourage innovation. But where the market is highly concentrated—where a few firms account for most or all of the business—there is, as this Court observed in *United States* v. *Philadelphia National*

Bank, 374 U.S. 321, 363, a real danger that the firms will find their interests best served by tacitly renouncing vigorous competition, by adopting a policy of "live and let live." Actual competition may then cease to be a fully effective force; by mutual, though tacit, consent, it may be abandoned in favor of parallel behavior and the "easy life." *United States* v. *Aluminum Co. of America*, 377 U.S. 271, 280.

It is therefore important that the firms in a concentrated market remain subject to a significant form of competitive restraint; and that is the role of potential competition. Potential competition (*i.e.*, the threat of entry by strong firms outside the market either independently or by acquisition of a small firm already in the market) often provides the most significant limitation on the exercise of market power by the leading firms in a concentrated market. Consequently, the elimination by acquisition of one of the leading potential entrants into the market can have a significant anticompetitive effect on the existing market structure. And this is particularly so where, as here, there are extremely few firms which have the incentive and capability to introduce a significant new competitive factor into the market.

For this reason, the effect of a merger or acquisition which results in the elimination of a significant potential competitor "may be substantially to lessen competition", contrary to Section 7 of Clayton Act. *Ford Motor Co.* v. *United States*, No. 70–113, O.T. 1971, slip op. 6, decided March 29, 1972; *Federal Trade Commission* v. *Procter & Gamble Co.*, 386 U.S.

568; *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158; *United States* v. *Continental Can Co.*, 378 U.S. 441; *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651.[23] The continued presence of a number of strong firms on the periphery of such a market with the capability and incentive to enter it is both an external factor influencing the conduct of those firms already inside,[24] and a possible source of future deconcentration through independent or "foothold" entry.[25] This Court has recognized the importance of preserving the sources of deconcentration in concentrated markets. "[I]f concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great." *United States* v. *Philadelphia National Bank, supra,* 374 U.S. at 365.

[23] See also *United States* v. *Standard Oil Co.*, (N.J.), 253 F. Supp 196 (D. N.J.); *United States* v. *Jos. Schlitz Brewing Co.*, 253 F. Supp. 129 (N.D. Cal.), affirmed, 385 U.S. 37; *United States* v. *Wilson Sporting Goods Co.*, 288 F. Supp. 543 (N.D. Ill.); *Ekco Products Co.* v. *Federal Trade Commission*, 347 F.2d 745 (C.A. 7); *General Foods Corp.* v. *Federal Trade Commission*, 386 F.2d 936 (C.A. 3), certiorari denied, 391 U.S. 919.

[24] See also Bain, *Industrial Organization*, 2d ed. 1968, p. 8; Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 Harv. L. Rev. 1313, 1372–1373 (1965); Areeda, *Antitrust Analysis*, 517–518 (1967).

[25] "Foothold" entry means entry by a new competitor into a market through acquisition of a small competitor already operating there. See *The Bendix Corp.*, 3 Trade Reg. Rep. ¶ 19,288, vacated and remanded on other grounds, *The Bendix Corporation* v. *Federal Trade Commission*, 450 F. 2d 534 (C.A. 6); *The Stanley Works* (Order of the Federal Trade Commission dated May 17, 1971), 3 Trade Reg. Rep. ¶ 19,646.

fn. 42.[26] An acquisition that eliminates such potential competition may have no less serious anticompetitive effects than one that eliminates existing competition. Cf. *United States* v. *Penn-Olin Chemical Co., supra*, 378 U.S. at 168, 170–174.

Potential competition is as important in banking as in any other industry, perhaps more so. Because local banking markets can support only a limited number of banks, such markets necessarily tend to be concentrated. The possibility of outside entry is, therefore, of particular significance, since it may be the only factor that inhibits anticompetitive conduct by firms within the market and also the most likely means for achieving market deconcentration.

B. The Anticompetitive Effect of an Acquisition That Eliminates a Significant Potential Banking Competitor Is Even Greater Where It Is Part of a State-wide Trend Toward Concentration in Banking.

A recent trend in the banking industry has been the acquisition by large banks (in states that permit branch banking) or by holding companies of the leading independent banks in concentrated local markets. The existence of this condition increases the anticompetitive effect of an acquisition, such as the one involved here, that eliminates from the edge of a local market a potential entrant which merely substitutes itself for an already established local bank with a

[26] "New entry can, of course, quickly alleviate 'undue' concentration. And the possibility of entry can act as a substantial check on the market power of existing competitors." *United States* v. *Phillipsburg National Bank, supra*, 399 U.S. at 377 (Mr. Justice Harlan, dissenting).

substantial market share. Such an acquisition not only removes the significant procompetitive effect upon local market behavior that the acquiring firm provided; it also jeoparizes the vigor of competition in the area which, because of its concentration, depends so much on the presence of strong independent banks.

When a few leading institutions within a state enter most of that state's significant local banking markets by purchasing large market shares instead of competing for them, the same organizations begin to confront each other as the dominant factors in separate concentrated markets all over the state (App. 133–134). This creates a real danger that the dominant banks, not faced with the difficulty of having to compete locally for survival—as would be the case had entry been made *de novo* or by foothold acquisition—will tacitly renounce vigorous competitive practices in the areas in which they operate (App. 141–142); the few state leaders, facing each other in commonly linked oligopolistic markets, will be encouraged to pursue parallel practices in disregard of local competitive conditions (*ibid;* App. 133, 134).[27] "As that condition develops the greater is the likelihood that parallel policies of mutual advantage, not competition, will emerge." *United States* v. *Aluminum Co. of America, supra,* 377 U.S. at 280.

Just such a situation now threatens in Colorado. Seven Colorado holding companies already control more than half of the state's total deposits (J.S., App.

[27] See also Elinor Harris Solomon, *Bank Merger Policy and Problems—A Linkage Theory of Oligopoly*, Journal of Money, Credit and Banking, p. 323 (1970).

A, p. 35); they own almost half (13) of the 27 most significant banks—those having total deposits in excess of $20 million (PX 125, App. 1157)—outside of Denver. And, but for the institution of government antitrust litigation and the disapproval of other acquisitions by the bank regulatory authorities because of their adverse competitive effects, the degree of statewide concentration would have been even greater.[28]

[28] The largest state-based holding company, United Banks of Colorado, Inc., abandoned plans to acquire the third largest bank in Colorado Springs because the purchase agreement expired during the period that a government antitrust suit to enjoin its consummation was pending (App. 2001–2002). Similarly, Bancorporation's attempt to acquire the second largest bank in Colorado Springs and El Paso County was dropped when the government brought suit (PX 145, App. 1199–1221; DX 54, App. 1764–1793). Its application to acquire the largest bank in Pueblo was rejected by the Federal Reserve Board on competitive grounds (DX 49, App. 1729–1736). And a government civil antitrust action is now pending with respect to its proposed acquisition of the largest bank in Sterling and Logan County (*United States* v. *First National Bancorporation, Inc., and the Security State Banking of Sterling*, D. Col., C–2754, filed Dec. 2, 1970).

Had the foregoing transactions been consummated, the total number of banks outside of Denver with deposits of more than $20 million that would now be controlled by these holding companies, including the instant acquisition, would be 18 out of 27 (see PX 125, App. 1157). Moreover, the state's largest holding companies would have been much closer to the situation in which each was operating with a large market share in each of the State's six most significant banking markets, namely, Denver, Colorado Springs, Pueblo, Boulder, Greeley and Fort Collins. United is now in six of these markets including Colorado Springs in which its foothold entry recently was approved. See n. 9, supra, and J.S., App. A, pp. 35, n. 5. Western is in Denver and Fort Collins (*ibid.*). The fourth largest, Affili-

A recognized authority in state and federal bank regulation has recently written that "the potential competition standard may be the only criterion available to the bank regulatory agencies or the courts by which a trend toward a market dominated by only a handful of banks or bank holding companies may be checked."[29] The trend may develop extremely rapidly.[30] Indeed, in a number of states it has reached

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ated Bankshares, Inc., is in Colorado Springs, Boulder and Greeley (*ibid*). The appellee here, Bancorporation, is in Denver and Boulder, but would have been in all except Fort Collins (*ibid.*). Thus in the five markets outside of Denver in which these holding companies operate, there would have been only three banks with deposits of more than $20 million not already controlled by them—one in Colorado Springs (the lead bank in Central Colorado Bancorporation, Inc.) and two in Pueblo). Compare DX 1, App. 1329–1336, DX 3 App. 1371–1372, and above text at pp. 5–6 with DX 2, App. 1337–1370.

The banks Bancorporation sought to acquire in Pueblo and Colorado Springs are now the largest banks in a recently approved new five-banks holding company (App. 1997–2000; *Mountain Banks, Ltd.*, 58 Fed. Res. Bull. 315). The organization is interested in further expansion, and one of its principal organizers testified that it would not rule out an acquisition of FNB Greeley should it become available (App. 2001).

[29] Frank Wille, then New York Superintendent of Banking and now Chairman, Federal Deposit Insurance Corp., in foreword to Kohn and Carlo, *Potential Competition: Unfounded Faith or Pragmatic Foresight?* (New York State Banking Department, 1970).

[30] Board of Governors of the Federal Reserve System, *Recent Changes in the Structure of Commercial Banking*, 56 Fed. Res. Bull. 195 (1970). As there pointed out, statewide concentration ratios measured by total deposits held by the five largest banking organizations are very high.

The practical enforcement problem in dealing with a trend of acquisitions is especially acute in banking. Under the terms of the Bank Merger Act and the Bank Holding Company Act,

the point where two or three banking organizations together control more than half of the state's total deposits (DX 30, App. 1662–1663). In some states where the concentration has been very intense, there have recently been some signs of deconcentration as new banking organizations have been created. The situation in the banking industry today is therefore at a crucial stage in which the trend could go either toward increased statewide concentration, or toward a more competitive situation.[31]

"There is no reason to think that concentration is less inimical to the free play of competition in banking than in other service industries" (*United States* v. *Philadelphia National Bank, supra,* 374 U.S. at 369). The recent increase in concentration of the banking business in Colorado necessarily is felt in the concentrated local markets, as state-wide firms acquire one important bank after another. Section 7 of the Clayton Act applies equally to large and small banking markets (cf. *United States* v. *Phillipsburg National Bank, supra,* 399 U.S. at 357–358). In determining the effect of the present acquisition upon competition in the Greeley Area, the broader context in which the

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the government must commence antitrust proceedings against an approved bank merger or holding company acquisition within 30 days of the approval. See 12 U.S.C. 1828(c)(6) and 1849(b). By the terms of the statutes, the government does not have the option, available in other industries, to take appropriate remedial action at some later time to undo mergers which subsequently appear to have been part of an anticompetitive trend.

[31] *Recent Changes in the Structure of Commercial Banking, supra,* n. 30.

acquisition took part—the state-wide trend toward concentration—is a significant factor.

The district court, however, declined to consider the state-wide trend toward concentration in evaluating the competitive impact of this acquisition. It held, instead, that Bancorporation was not a potential entrant into the Greeley market, on the basis of testimony by officials of that firm that in fact they would not have entered the market except by the acquisition of FNB Greeley. We argue below that the subjective intent of the acquiring firm is not the proper basis under Section 7 for determining whether it is a potential market entrant. The district court's analysis is further flawed, however, by its failure to recognize that the trend by all the bank holding companies in Colorado, including Bancorporation (see n. 28 *supra*), to enter important local markets made Bancorporation a more visible potential competitor to those banks in the Greeley market and increased the likelihood that it would have entered either by acquiring a smaller bank or by itself attempting to come in independently.

C. The Determination Whether the Acquiring Firm Is a Potential Competitor Depends Upon the Objective Facts Relating to Its Independent Entry Into the Market and Not Upon Management's Subjective Statements With Respect to the Likelihood of Such Entry.

In determining that Bancorporation was not a potential entrant into the Greeley Area, the district court placed principal reliance on testimony by FNB Denver officials that Bancorporation did not intend to enter that market except by acquisition of FNB

Greeley, with its large market share. "The evidence is uncontradicted," it stated (J.S., App. A, p. 49) "that Bancorporation has no intention of entering the Greeley market if this acquisition is disapproved." Although it found that "Bancorporation has the financial capability to enter the Greeley market *de novo*," the court concluded (J.S. App. A, p. 50) that "the practical difficulties, together with the expense, argue against Bancorporation's following this route." ~~novo," the court concluded (J.S., App. A, p. 50) that~~

As this Court has recognized, however, the application of Section 7 to corporate combinations that involve the elimination of potential competition cannot turn on subjective statements ~~of~~ corporate intent. In *United States* v. *Penn-Olin Chemical Co., supra,* 378 U.S. at 175, after a full review of objective evidence showing the capability and incentive of joint venturers to enter a market independently, this Court held: "Unless we are going to require subjective evidence, this array of probability certainly reaches the prima facie stage. As we have indicated, to require more would be to read the statutory requirement of reasonable probability into a requirement of certainty. This we will not do." See also *Federal Trade Commission* v. *Procter & Gamble Co.,* 386 U.S. 568, 580–581.

The proper standard, we submit, for determining whether a firm is a potential entrant into a new market is based upon objective factors: whether, considering the structure of the market, the putative entrant's financial capability to enter independently,

its economic incentive to do so, and the reasonable prospects for making such an entry successful, there exists a basis for entry which would be reasonably acceptable to prudent management, if entry by acquisition of a large market share was not available.

Section 7 is concerned with the prevention of anti-competitive market structures and is designed to cut off trends toward concentration in their incipiency. Business management, by contrast, is necessarily and properly motivated by a purpose to maximize profits. Decisions must be made by bank executives in light of the most immediate profit advantages to their banks; their business judgments do not depend on preserving the industry structure that is most likely to encourage competition.

Thus, management's stated reluctance to enter a market *de novo* or by a foothold acquisition is not a ground for concluding that the firm is not a potential entrant. See *United States* v. *Ford Motor Co.*, 286 F. Supp. 407, 421 (E.D. Mich.), affirmed, No. 70-113, this Term, decided March 29, 1972. Almost always it is easier for a firm to enter a market by purchasing a large existing market share than by engaging in the competitive struggle required for independent entry or expansion through a small "foothold" acquisition; this method of entry has the additional attraction of also removing a significant competitor (*i.e.*, the acquired firm) for the entering firm.

Bancorporation had an announced policy of expanding as rapidly as possible through acquisitions into growth areas which would generate the highest

profits to shareholders (PX 3, App. 513). But, from the standpoint of preserving a competitive market structure, the fact that expansion can be accomplished by more profitable means is not a bar to or inconsistent with independent entry. *United States* v. *Standard Oil Co. (N.J.)*, 253 F. Supp. 196, 220–223, 227 (D.N.J.). Section 7 reflects the fundamental concept of insuring that the profit motivation in our free enterprise system is directed into procompetitive channels.

If management's subjective preference to maximize profits by entering a market through acquisition rather than independently were deemed controlling, Section 7 could not achieve its purpose of prohibiting all acquisitions whose effect "may be substantially to lessen competition." It is therefore essential in assessing the role of a potential entrant on the edge of a market that the situation "be viewed functionally in the context of the particular market involved, its structure, history and probable future." *United States* v. *Continental Can Co., supra,* 378 U.S. at 458; *United States* v. *Philadelphia National Bank, supra,* 374 U.S. at 357–358; *United States* v. *Phillipsburg National Bank, supra,* 399 U.S. at 360, 365.

Such an objective evaluation not only provides a more accurate barometer for gauging the capabilities of independent entry, but also affords a more realistic reading of the potential entrant's impact on the conduct of those firms already in the market under scrutiny. *See, e.g., Ford Motor Co.* v. *United States, supra; United States* v. *Penn-Olin Chemical Co., supra.* Ordi-

narily, firms in the market will be aware of objective factors bearing on the economic incentive of others to enter, and the financial capacity of such firms to do so. But they will not be aware of the relative profit advantages to an outside firm that bear on management's determination whether to enter independently, or by acquisition, or not to enter at all. And even if the outside firm publicly announces a preference for expansion by acquisition, experience teaches that such decisions are not immutable. See Pitofsky, *Joint Ventures Under the Antitrust Laws: Some Reflections on the Significance of Penn-Olin*, 82 Harv. L. Rev. 1007, 1024 (1969).

There is yet another reason for using objective rather than subjective criteria in resolving potential competition cases. Under the approach of the district court, the competitive status of a firm on the edge of the market depends essentially on the trial court's evaluation of the sincerity of statements by that firm's management that independent entry is not a feasible alternative to entry by acquisition of a bank with a large market share. This introduces a highly uncertain factor into the administration of Section 7.

Management officials, who naturally attempt to justify their corporate decision to enter a market by acquisition, are often unable to give disinterested, retrospective testimony about what their corporation would have done if it had not been able to consummate the acquisition. Moreover, experience has shown that when an anticompetitive bank acquisition is blocked by antitrust or other regulatory authority, the acquir-

ing firm may turn to a more competitive method of market entry that it originally concluded it would not pursue. In our growing economy, banking organizations have strong economic incentives to expand into new markets, and where they cannot do so by acquisition of a local leader in the relevant market, they often are willing to do so by *de novo* entry or foothold acquisition.[32]

This has happened in Colorado. Bancorporation's application for Federal Reserve Board approval to acquire Exchange National Bank, a large downtown institution in Colorado Springs, characterized entry *de novo* or by a small foothold acquisition as "imprudent."[33] But after this acquisition was abandoned in the face of a government antitrust suit, n. 28, *supra,* Bancorporation applied for approval of a small foothold acquisition in the Colorado Springs market, which it justified "inasmuch as Bancorporation was forced to cancel its agreement to acquire the Exchange National Bank of Colorado

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[32] Banks' incentive to expand is demonstrated by nationwide data which show that the rate at which the number of local banking offices increases is highest in states with the fewest restraints on the opening of new banking offices (DX 33–34, App. 1671–1687). See also Board of Governors of the Federal Reserve System, *Recent Changes in the Structure of Commercial Banking*, 56 Fed. Res. Bull. 195, 205–208 (1970); Vernon, *Regulatory Barriers to Branching and Merger and Concentration in Banking Markets*, 37 The Southern Economic Journal 349 (1971).

[33] Application to the Board of Governors for Prior Approval of Acquisition by Bancorporation of the Exchange National Bank, pp. G-21—G-23 (March 2, 1970).

Springs * * *."[34] Similarly, United, the state's largest holding company, agreed to acquire a much smaller bank in Colorado Springs after its attempt to enter that city by buying its third largest bank was abandoned in the face of a government antitrust suit (App. 2001–2002).[35] There has been the same behavior in other states,[36] and in other industries as well.[37]

[34] Application to the Board of Governors for Prior Approval of Acquisition by Bancorporation of the East Colorado Springs National Bank, pp. 10, 46, 72–73. The Board approved this application on April 25, 1972.

The abandoned acquisition involved a major bank with June 1970 deposits of $52.3 million, which were 19.5 percent of total Colorado Springs deposits, while the foothold acquisition Bancorporation subsequently proposed involves a bank with $7.4 million in deposits, constituting only 2.5 percent of the city's total (PX 147, App. 1225).

[35] The Federal Reserve Board approved this application on December 7, 1971, 58 Fed. Res. Bull. 58.

[36] A recent study of proposed bank acquisitions in New York that the state banking authority prohibited in order to preserve the potential competition of the acquiring bank shows that in ten of thirteen cases between 1961 and 1963, the applicant then entered the market involved independently or by a smaller acquisition. Kohn & Carlo, op. cit., *supra*, n. 29.

Experience elsewhere is similar. In Florida, four of the state's largest banks were barred from combining under a common holding company. Each bank then formed its own holding company and the four banking organizations now compete directly with each other. See Salley, *A Decade of Holding Company Regulation in Florida*, Federal Reserve Bank of Atlanta, Monthly Review, (July 1970). In Connecticut, a proposal to combine the state's largest bank and another large Connecticut bank was abandoned in the face of a government antitrust suit. The unsuccessful acquiring bank has since filed two applications for *de novo* entry and a proposal for a smaller acquisition which would bring it into three communities in the market area of the bank it proposed to acquire. See *American Banker*, February 24, 1971, p. 2.

[37] See Brief for the United States, *United States* v. *Falstaff Brewing Co.*, No. 71–873, this Term.

This economic experience indicates that subjective testimony as to corporate intentions and economic preferences is an unreliable basis for decision under Section 7. Moreover, if such subjective evidence were controlling, it would make the antitrust consequences of an acquisition completely unpredictable to business and government alike. As this Court noted in *United States* v. *Philadelphia National Bank, supra,* 374 U.S. at 362, "unless businessmen can assess the legal consequences of a merger with some confidence, sound business planning is retarded." See also *United States* v. *Topco Associates,* No. 70–82, this Term, decided March 29, 1972, slip op. 13 n. 10.[28]

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[28] Appellees argue (Motion to Affirm, p. 16, n. 16) that "subjective representations are, if true, not merely relevant, they must be conclusive." They rely heavily upon the second *Penn-Olin* case, 246 F. Supp. 917 (D. Del.), affirmed *per curiam* by an equally divided Court, 389 U.S. 308. That affirmance, of course, is of no precedential significance, and there appears to have been no departure from this Court's insistence on objective evidence in *Penn-Olin I* (378 U.S. at 175). Moreover, even accepting *arguendo* the district court's second *Penn-Olin* decision as correct, it is not applicable in this case because there are significant differences between the joint venture involved in *Penn-Olin* and the acquisition involved here. The *Penn-Olin* joint venture for entry into a new market created new actual competition which may have had a significant deconcentrating and procompetitive effect. But see Pitofsky, op cit., *supra*, p. 32, at 1030–1062. In contrast, the market extension merger in this case simply substitutes one competitor for another and thus has no potential deconcentrating effect whatever. Instead, the acquiring firm's potential for future deconcentration and its actual influence on the market as a potential competitor are both permanently lost. Cf. *Penn-Olin I, supra; United States* v. *Procter & Gamble, supra; Ford Motor Co.* v. *United States, supra.*

For these reasons, we submit that the fundamental determination in potential competition cases cannot depend upon management's stated economic preferences as between independent entry and entry by acquisition, but must be based on an objective appraisal of the factors bearing on whether independent entry is preferable to no entry at all for a firm with the potential entrant's capabilities and incentives. The basic question is whether, considering all the circumstances, independent entry in the future is a reasonable choice for prudent management if entry by large acquisition is not available. Where a concentrated market is growing, and profit expectations in it are good, an outside firm with the legal, technological and financial capability to enter must be viewed as a potential entrant if it would be reasonable for it to enter independently or by a foothold acquisition. Such a firm serves both as a future source of deconcentration and as a restraining influence on existing competitors.[39]

D. Bancorporation Is a Significant Potential Entrant Into the Greeley Banking Area.

Under the objective criteria we have outlined, Bancorporation is a significant potential entrant into the Greeley banking market because (1) the Greeley Area

[39] There may be other beneficial effects from preserving the firm as a potential entrant, such as the creation of a new competitor. Two banks which Bancorporation unsuccessfully sought to acquire in Pueblo and Colorado Springs are now the largest banks in a recently formed holding company which may compete with Bancorporation and other Colorado holding companies in entering the Colorado banking markets (app. 1997–2000; see n. 28, *supra*).

has been undergoing substantial economic growth which makes it an attractive place for investment; (2) Bancorporation is one of the few firms that has the ability to enter as a substantial competitor in the market; and (3) Bancorporation has shown substantial interest in expanding into such local markets. Finally, (4) the fact that a bank regulatory official testified that he would not now charter a new bank in the Greeley Area does not undermine the conclusion, compelled by the objective evidence, that Bancorporation is a potential entrant into that market.

1. *The Greeley market is attractive to new entry.* In the decade of the 1960's, the Greeley Area had undergone rapid and expansive development. Its population increased 30 percent; its total personal income rose from $119.5 million in 1959 to $212 million in 1968, accompanied by a shift from a predominantly agricultural to a more mixed economy; and its gross sales increased by 281.8 percent (see Statement, *supra* at pp. 8–9). At the time Bancorporation made the acquisition, the Eastman Kodak Company was locating a national industrial facility in Windsor, just outside the Greeley Area, which would have a significant affect on the economy of Windsor, Greeley and the neighboring towns. The banks doing business in the area were all profitable (App. 453–455, 462).

The Greeley Area was, therefore, in the words of the government's expert witness, a market which "would be attractive to outside banks" (App. 73).

2. *Bancorporation is one of the few firms that has*

the ability to enter the Greeley market in a meaningful way. Bancorporation, the state's second largest holding company, was one of three large Colorado banking organizations with the legal capacity, financial capability, and economic incentive to enter the Greeley Area independently or by a foothold acquisition and have a substantial impact on competition in the market.

Two of the state's seven holding companies, United and ABC, already controlled four institutions in Greeley, accounting for 60 percent of the area's total deposits. A third, Western Bancorporation, is barred from future expansion in Colorado as an out-of-state firm. 12 U.S.C. 1842(*d*). Of the three remaining holding companies (other than Bancorporation), only Colorado CNB Bankshares, with combined deposits of $281.3 million, and First Colorado Bankshares, with combined deposits of $120.4 million, have sufficient assets to be capable of meaningful *de novo* or foothold entry.[40] The other organization, Central Colorado Bancorporation—has combined deposits of only $36 million and is too small—smaller indeed than the acquired bank—to be a significant entrant. (Statement, *supra*, n. 14).[41]

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[40] Colorado CNB bankshares has recently applied for a new charter in Greeley (Motion to Affirm, p. 23).

[41] Bancorporation's contention that there are many potential entrants into the Greeley market is not well taken. It is based apparently on the fact that although 64 new banks opened in Colorado between 1960 and 1970, only ten of them were organized by persons associated with the state's six largest banking organizations (Motion to Affirm, p. 19). These small banks, however, often operated for the most part by inexperienced

Bancorporation's capability to enter the Greeley Area independently is undisputed (J.S., App. A, p. 50). Moreover, its lead bank (FNB Denver) has organized *de novo* banks in the Denver suburbs, as the population has shifted to those areas; it has not ruled out future expansion of this kind (App. 286; PX 4, App. 536; PX 6, App. 561–564).[42]

3. *Bancorporation has shown substantial interest in expanding into new markets.* Bancorporation had for some time manifested substantial interest in expanding its operations. As noted earlier, it had filed six applications between 1969 and 1971 to enter new Colorado

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personnel, cannot provide local banking markets with the same wide range of sophisticated banking services that can be provided by a large and experienced organization such as Bancorporation, as Bancorporation's own witness pointed out (App. 294.) See Board of Governors of the Federal Reserve System, *Recent Changes in the Structure of Commercial Banking*, 56 Fed. Res. Bull. 195, 197 (1970). Nor can penetration of a new market by such small institutions—frequently mere shopping center offices—furnish the same competitive impact as a large new entrant.

[42] Bancorporation suggests that, despite its size and resources, it should not be deemed a significant potential entrant in view of the experience of two other large holding companies, United and Western, both of which lost market shares upon entering new markets (Motion to Affirm, pp. 19–23). But not one of the seven instances of "unsuccessful" entry cited by Bancorporation involved a *de novo* entry by United or Western. Each involved the acquisition of a bank which, like FNB Greeley, was a market leader in its local area at the time it was acquired by the holding company. Thus, far from showing that large organizations are incapable of meaningful competitive entry, the examples cited by Bancorporation demonstrate, instead, that the acquisition of local market leaders by such large banking institutions is not likely to make the acquired bank a more aggressive competitor (see discussion *infra*, pp. 51–52).

banking markets by acquisition (see nn. 9 and 28, *supra*, and accompanying text at pp. 7–8 *supra*). It had been particularly active in and around the Greeley Area.

Its lead bank, FNB Denver, which operated a loan production office in that area, had made a number of large loans there and had solicited trust business in the community (Statement, *supra*, p. 11).[43] In addition, Bancorporation had actively considered entry into neighboring Loveland [44] by converting a small industrial bank there to commercial operations (PX 6, App. 563–564).[45] It had also conducted negotiations to purchase a small bank in Windsor, a town fifteen miles from the City of Greeley, but it terminated these discussions about the time that FNB Greeley became available (PX 24, App. 1324; see also PX 6, App. 539–542; PX 41, App. 1036–1037).

4. *Bancorporation is a potential entrant into the Greeley market despite the testimony of a banking*

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[43] See generally, Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 Harv. L. Rev. 1313, 1375.

[44] Loveland's population growth over the past decade was substantial, but it was only roughly half that of Greeley's in absolute numbers (DX 6, App. 1376–1378). Moreover, in terms of the ratio of banking officers to population, Loveland, with three offices and a ratio of 5,406 persons per office, was a more crowded market than Greeley, with its ratio of 6,484 persons per office (compare DX 2, App. 1337–1370 with DX 6, App. 1376–1378).

[45] A former industrial bank, which has already been converted to a commercial bank, also serves Greeley. A Bancorporation witness testified that this institution, State Bank of Greeley, was unavailable because its owners insisted on unreasonable terms (App. 298); one of the principals of that bank, however, has died (App. 299).

official that he would not recommend the chartering of a new bank in that area. The Regional Administrator of National Banks, who would recommend to the Comptroller of the Currency whether to charter a new national bank in the Greeley Area (App. 341), testified that he "could not see a need of a new national bank in Greeley" (App. 330) "in the foreseeable future," which he considered to be "upward to five years" (App. 330). On the basis of this testimony, the district court concluded (J.S., App. A, p. 50) that "[a]pproval of a national charter by the Comptroller of the Currency" was "unlikely." The court also stated that there was "[t]estimony from the State Banking Commissioner indicat[ing] that a new state charter would not be granted, because the growth of the area would not justify it" (J.S., App. A, pp. 49–50). In fact, however, the State Banking Commissioner refused to express any opinion in his testimony with respect to whether he would authorize a new bank in the Greeley area, since no application therefor was then pending (App. 490–493).

There is serious question whether the evidence of the Regional Administrator of National Banks is admissible on such a question. This was at best an "advisory opinion," not based on concrete facts presented by a specific application. An opinion expressed in such circumstances is peculiarly unreliable, since it may be subject, consciously or unconsciously, to pressures of one sort or another; and such pressures may well be exactly the opposite of those which would be present when an actual application made on behalf of

a bank was under consideration. Moreover, the hypothetical opinion was expressed by the Regional Administrator of National Banks, a subordinate official, who does not make the actual decision. That is made by the Comptroller of the Currency.

The attitude and policies of regulatory authorities can and do change. The fact that the Regional Administrator saw no need for an additional bank in Greeley when he testified in this case does not mean that he would reach the same conclusion at some future time. Nor is it certain that even if he so recommended, the Comptroller of the Currency would accept the recommendation (App. 332–333). Moreover, conditions in local banking markets do not remain static, and changes may indicate the need for an additional bank tomorrow where none exists today.

In any event, the question whether there might be a potential entrant should be determined on the basis of the actual geographic, demographic, and economic facts. Those facts show, as we have indicated, that Bancorporation is a potential entrant into the Greeley Area; certainly they do not establish that Bancorporation is not a potential entrant. A potential entrant is a significant factor with respect to a market as long as there is a reasonable basis on which it might be authorized to go into the market. The threat that a regulator may allow entry is a factor tending to restrain those already in the market, as the defendant's expert testified (App. 266–267).

For these reasons, the testimony of officials of regulatory agencies as to the recommendations they might make to their superiors concerning the chartering of a

new bank is an inadequate basis for a judicial determination whether the acquiring firm would be likely to obtain regulatory approval if it sought independently to enter the market. Whether the Comptroller of the Currency would be "unlikely" to approve a new national bank in the Greeley area, as the district court concluded, depends rather upon all the factors as they may exist at the time such application is made.

Where, as in the present case, the market is not overbanked—*i.e.*, it is growing and the existing banks are profitable—the regulatory decision on whether to authorize a new bank should turn upon the need of the community for additional banking services and not the wish of the existing banks to be protected against further competition. To assume that in such circumstances the regulatory authorities would not permit a new bank in the Greeley area would be at odds with the policy reflected in Section 7 of the Clayton Act that "corporate growth by internal expansion is socially preferable to growth by acquisition" (*United States* v. *Philadelphia National Bank, supra*, 374 U.S. at 370). The application of this policy to the Greeley market would be particularly likely in view of the trend in Colorado of bank acquisitions by holding companies; the regulatory authorities would not be oblivious to the fact that the alternative to permitting Bancorporation to organize a new bank in Greeley might be its acquisition of a substantial existing bank there, with the undesirable anticompetitive consequences described in this brief.[40]

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[40] Another factor indicating the inappropriateness of judicial reliance upon the kind of speculative prediction the Regional

Moreover, the approval of the Comptroller of the Currency was not necessary to the making by Bancorporation of a foothold entry through the acquisition of one of the smaller banks in the Greeley area. Such an acquisition would be within the exclusive jurisdiction of the Federal Reserve Board. *Whitney National Bank in Jefferson Parish* v. *Bank of New Orleans & Trust Co.*, 379 U.S. 411. There were three such banks available: a small commercial bank in the City of Greeley (State Bank of Greeley), and two small banks in the neighboring towns of La Salle (Platte National Bank) and Eaton (Eaton Bank) (J.S. App. A, pp. 32–33).

E. The Effect of the Acquisition May Be Substantially To Lessen Competition in the Greeley Area.

Section 7 of the Clayton Act prohibits any acquisition whose effect in the relevant market "may be substantially to lessen competition." The Bank Holding Company Act of 1956, as amended in 1966, 12 U.S.C. 1849(c), provides that the district courts, in deciding cases brought under Section 7 of the Clayton Act challenging bank holding company acquisitions, shall apply the same standard that the Act requires the Board of Governors of the Federal Reserve Sys-

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Administrator made in this case is that bank regulatory statutes are primarily aimed at preventing bank failures (see *United States* v. *Philadelphia National Bank*, *supra*, 374 U.S. at 326–329). Regulatory policies controlling entry necessarily also stress this factor (App. 329). There is no suggestion in this case, however, that the authorization of a new bank in Greeley would cause any of the existing ones there serious financial problems, let alone failure, and the Regional Administrator himself declined to suggest that consequence (App. 334).

tem to apply in considering such acquisitions. That standard (12 U.S.C. 1842(c)) prohibits the Board from approving any acquisition—

> * * * whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint or [47] trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

In every case, the Board shall take into consideration the financial and managerial resources and future prospects of the company or companies and the banks concerned, and the convenience and needs of the community to be served.

This is almost the same language that Congress used in the Bank Merger Act of 1966 for determining the legality of bank acquisitions subject to the regulatory jurisdiction of the Comptroller of the Currency and the Federal Deposit Insurance Corporation. It was subject to extensive Congressional consideration during the enactment of the Bank Merger Act; the similar language was adopted in the amendments to the Bank Holding Company Act several months later without any substantial discussion. Congress obviously intended the virtually identical language it used in the Bank Holding Company Act to

[47] So in orginal.

have the same meaning as the language it previously had used in the Bank Merger Act. Accordingly, this Court's decisions interpreting the Bank Merger Act (see, *e.g.*, *United States* v. *Phillipsburg National Bank, supra,* 399 U.S. at 357–358; *United States* v. *First City National Bank of Houston, supra; United States* v. *Third National Bank in Nashville, supra*) also govern the Bank Holding Company Act.

Under either statute, "[t]he task of the district courts [is] to inquire *de novo* into the validity of a bank merger approved by the relevant bank regulatory agency to determine, first, whether the merger offend[s] the antitrust laws and, second, if it [does], whether the banks ha[ve] established that the merger [is] nonetheless justified by 'the convenience and needs of the community to be served.'" (*United States* v. *Third National Bank in Nashville,* 390 U.S. 171, 178.) "To weigh adequately one of these factors against the other requires a proper conclusion as to each" (*id.* at 183).

As we read the opinion of the district court in the present case, its only holding was that the government had not shown an anticompetitive effect. The court did not attempt to determine whether, if there were such effect, the acquisition nevertheless should be upheld under the community "convenience and needs" standard. Although the court discussed appellees' contentions with respect to alleged benefits of the acquisition, this analysis related to the court's conclusion that this acquisition was not anticompetitive. Accord-

ingly, if the Court agrees with us that this acquisition had the anticompetitive effects condemned by Section 7, the case must be remanded to the district court to consider the "convenience and needs" defense. Cf. *Nashville Bank, supra,* 390 U.S. at 192; *United States* v. *Phillipsburg Bank, supra,* 399 U.S. at 369–370, 372–373.

1. *The Greeley market is highly concentrated.* At the time of the proposed acquisition, the three largest of the six banking organizations operating in the Greeley area—ABC, FNB Greeley and United—together had 98.2 percent of total deposits in the city of Greeley and 92 percent of deposits in the Greeley Area. Greeley's banking structure therefore was even more concentrated than the small market involved in *United States* v. *Phillipsburg National Bank, supra,* 399 U.S. at 366–367. The bank to be acquired (FNB Greeley) was not only the second largest in the area, with 33.9 percent of the city's total deposits and 31.8 percent of total deposits in the area, but was the only major bank there not under the control of any of the state's seven bank holding companies. See the Statement, *supra,* pp. 10–11.

Bancorporation seeks to avoid the significance of this market concentration by pointing to data that the number of banks in Greeley was, at the time of the proposed acquisition, similar to the number of banks in communities of similar size throughout the country (see Motion to Affirm, pp. 13–16). It relies upon the opinion of its expert witness that the relationship between concentration as measured by market shares,

on the one hand, and probable competitive effects, on the other, is very tenuous" (App. 444–449).

But this Court has consistently rejected any such comparison as a measure of banking concentration in Section 7 cases. Instead, it has treated market share figures as fundamental to a determination of anticompetitive effects. See *United States* v. *Philadelphia National Bank, supra,* 374 U.S. at 363; *United States* v. *Phillipsburg National Bank, supra,* 399 U.S. at 366–367.

A test for banking concentration in a particular market based on a comparison with the prevailing number of banks in cities of similar size would tie the Section 7 determination to a national average that bears only remotely on the central question under the antitrust statute, without due regard for the economic structure of the specific local market involved. To the extent that high concentration is the rule rather than the exception, the effect would be essentially to preserve existing concentration, and Congress' purpose to change that condition in banking, as well as other industries, could never be achieved. Moreover, it cannot be assumed, as Bancorporation contends that the data on which it relies reflect bank regulators' views as to that ratio of bank institutions to population that is necessary for achievement of optimum economies of scale. As noted in *United States* v. *Philadelphia National Bank, supra,* 374 U.S. at 324–330,

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" Bancorporation's expert expressed similar views as a witness for the defendant banks in the *Phillipsburg* case. See Appendix Volume 1, pp. 500–506, 522–528, No. 1093, October Term, 1969.

bank regulation is primarily concerned with preserving bank solvency, not with the optimum competitive structure.

2. *The acquisition of FNB Greeley by Bancorporation may substantially lessen competition by eliminating Bancorporation as a significant potential competitor in the Greeley market.* The district court held that to prove a violation of Section 7 the government had to show that the effect of the acquisition "would be substantially to lessen competition" (J.S., App. A, p. 47), and it concluded that the government had not sustained its allegations that the acquisition "has the effect substantially to lessen competition" (*id.*, p. 61). That, of course, is not the test under Section 7.

The statute condemns acquisitions whose effect "may be" substantially to lessen competition, and the government is not required to show either that that "would be" its effect or that it "has" that effect. It need show only a "reasonable likelihood" (*United States* v. *Penn-Olin Chemical Co., supra,* 378 U.S. at 171) or "reasonable probability" (*id.*, p. 175; *United States* v. *Von's Grocery Co.,* 384 U.S. 270, 285 (Mr. Justice Stewart, dissenting)) that the acquisition would have that effect, that it "tended to lessen competition" in the area (*United States* v. *Third National Bank in Nashville, supra,* 390 U.S. at 183). Section 7 "look[s] not merely to the actual present effect of a merger but instead to its effect upon future competition" (*United States* v. *Von's Grocery Co., supra,* 384 U.S. at 277).

The effect of the proposed acquisition here may be substantially to lessen competition in the Greeley banking area. That market is highly concentrated: the three leading banking organizations have more than 90 percent of the business. The presence at the edge of such a concentrated market of a substantial firm that is a potential entrant is an important factor that tends to make the firms in the market more competitive and to inhibit their anticompetitive behavior. See, *supra*, pp. 20–23. As this Court recognized in *United States* v. *Penn-Olin Chemical Co., supra*, 378 U.S. at 174:

> * * * Nevertheless, "[p]otential competition * * * as a substitute for * * * [actual competition] may restrain producers from overcharging those to whom they sell or underpaying those from whom they buy * * *. Potential competition, insofar as the threat survives [as it would have here in the absence of Penn-Olin], may compensate in part for the imperfection characteristic of actual competition in the great majority of competitive markets."

Bancorporation's acquisition of FNB Greeley would eliminate the mediating effect upon competition that the acquiring firm is able to exert as long as it remains a potential entrant. Since, moreover, the acquisition would merely change the ownership of FNB Greeley, it would not introduce any new competitive factor into the market. The elimination of potential competition in this instance, therefore, would

have a more serious anticompetitive impact than exists when two potential entrants combine to enter a market through a joint venture. In the latter situation, the loss of potential competition is counterbalanced by the creation of a new firm that actually enters the market. Cf. *United States* v. *Penn-Olin Chemical Co., supra,* 378 U.S. at 170, 172–174.

A further anticompetitive effect of this acquisition is that it would bring under holding company control the only one of the three principal banks in the Greeley area that is now an independent local entity. A single large independent bank is more likely to engage in vigorous competition if it is not one of those firms controlled by holding companies, which themselves are in similar competitive situations in many markets throughout the state. See, *supra,* pp. 23–24. The acquisition therefore would change the present market structure, with whatever competitive vigor a large independent provides against holding company-controlled banks, to one in which traditional oligopolistic patterns of mutual accommodation rather than vigorous competition are likely to emerge.

Appellees argue (Motion to Affirm, pp. 25–26), however, that they would make FNB Greeley a more vigorous and efficient competitor (App. 464–465). But possible improvements in banking service that might result from the acquisition are to be considered under the "convenience and needs" defense (see, *supra,* pp. 46–47); they are not relevant in determining whether there is a violation of Section 7. *United States* v. *Phillipsburg National Bank,* 399 U.S. at

367–368. In any event, appellees' anticipated improvements are not borne out by the results of the acquitions of leading local banks in other areas by two bank holding companies (*supra,* n. 42).

The district court did not find that Bancorporation's acquisition would make FNB Greeley a more aggressive competitor, but only that it was unlikely that the acquisition would make it less aggressive (J.S., App. A., p. 50). Moreover, other bankers in the Greeley Area apparently were skeptical that the acquisition would make FNB Greeley a more vigorous competitor; they indicated that they preferred to have Bancorporation enter by taking over an established bank rather than by organizing a new one. As the president of the State Bank of Greeley explained in supporting the acquisition (DX 68, App. 1814): "We are very much opposed to a *de novo* bank commencing business in Weld County at the present time. Despite the projected population growth, the present banks can satisfactorily accommodate the needs of the Community for the foreseeable future. A de novo bank does not bring in new deposits, but instead draws funds from other banks."

Finally, the acquisition would eliminate the possibility for deconcentration of the market that would result if Bancorporation either entered the market independently or through a foothold acquisition of one of the small banks in Greeley. If Bancorporation took either of the latter steps, it would be required to compete vigorously to obtain a significant share of the market. On the other hand, there is every reason to

believe that, if each of the three leading banks in the Greeley Area is owned by a holding company, the existing concentrated structure of the market will continue indefinitely or, indeed, may become more concentrated.

One of the major concerns of Congress in amending Section 7 of the Clayton Act in 1950 was to stem the rising trend of concentration in American business. *United States* v. *Philadelphia National Bank, supra,* 374 U.S. at 362–363; *United States* v. *Penn-Olin Chemical Co., supra,* 378 U.S. at 170–171; *Brown Shoe Co.* v. *United States, supra,* 370 U.S. at 331–332. Because of the central role banking plays in the American economy, the prevention of concentration in that industry is of particular sigificance. The acquisition of FNB Greeley by Bancorporation would eliminate any possibility for deconcentration that now exists in the highly concentrated Greeley market, and would further the anticompetitive tendencies that are inherent in the market. The effect of the merger "may be substantially to lessen competition" there, in violation of Section 7.

A local geographic market such as the Greeley Area is plainly entitled to the benefit of this standard. See, *e.g., United States* v. *Phillipsburg National Bank, supra.* Similarly where, as here, the particular acquisition challenged is part of a statewide trend toward concentration, that trend is necessarily relevant to a proper evaluation of the effect that the acquisition "may tend" to have upon competition. *United States* v. *Brown Shoe Co., supra,* 370 U.S. at 317; *United*

States v. *Pabst Brewing Co., supra*, 384 U.S. at 551–552. Since entry by out-of-state firms is barred by law, if all the local banking markets in a state should become dominated by the same few firms, bank customers would no longer have a meaningful alternative to the banking policies of the acquiring companies; the safeguard against possible exploitive conduct that inheres in the availability of alternative banking markets in the state disappears once those markets become dominated by the same firms.[19] The state of Colorado is an area of the country which has competitive significance in banking, and comes within the area protected by Section 7 (see *United States* v. *Pabst Brewing Co., supra*). Thus, in this case, the district court should have considered the acquisition's effect on future competition both in the Greeley Area and in the State of Colorado.

II. THE ACQUISITION MAY SUBSTANTIALLY LESSEN COMPETITION IN CORRESPONDENT BANKING IN COLORADO

Bancorporation's acquisition of FNB Greeley would have another anticompetitive effect; the foreclosure of the acquired bank as a customer for correspondent banking services in Colorado.

A. Correspondent Banking Is a Line of Commerce and Colorado Is an Appropriate Geographic Market

Correspondent banking, like commercial banking, is

[19] This is substantiated by the testimony of a banker in Greeley who concluded that, if prices for bank services in Greeley should get "out of line," business could be lost to FNB Denver, the acquiring bank (App. 301–302).

a congeries of services clustered around demand deposits; it involves, however, banking services that are provided by large "city" banks to small "country" banks, rather than to the public at large (App. 179, 199, 204–210). In a unit-banking state, such as Colorado, these services are supplied to and through local banks by interbank correspondent relationships; they are generally paid for by the maintenance of "correspondent balances," which are in fact interbank demand deposits (App. 236–237).

The full range of correspondent banking services includes such interbank services as check clearing, international banking, investment advice, personnel acquisition assistance and training, overline loans,[50] and the like (App. 183, 190, 234). Banks offering the complete line of such services tend to be located in the financial and political centers of a state (App. 219–220, 240–242). Moreover, customers for full-range correspondent banking services tend to be limited to "country" banks located in the same state. This is, in part, because it is important to have a primary correspondent familiar with local banking regulations (App. 246). In Colorado, there is the additional reason: state law requires state banks to use a Colorado correspondent as a depository for bonds or other collateral which must be posted as security for deposits of the State Treasurer (J.S., App. A, 57–58).

Correspondent banking is a well-recognized and distinct aspect of the Colorado banking industry (App.

[50] Overline loans are loans made together with another bank that is unable to satisfy its customers' credit needs because of its legal lending limits.

177, 188, 208, 218–219; PX 24, App. 835–837). Of the 227 commercial banks in the state, only three do not have a Denver correspondent (PX 235, App. 1322);[51] and, of the correspondent deposits held by Denver banks, between 60 and 65 percent in each instance are deposited by Colorado banks (PX 203, App. 1301–1302).

While other specialty institutions in the state, such as savings and loan associations and finance companies, provide certain services in competition with commercial banks,[52] they do not compete over the entire range of services. These submarkets are thus "not a basis for the disregard of a broader line of commerce that has economic significance." *United States* v. *Phillisburg National Bank, supra,* 399 U.S. at 360; and see *United States* v. *Philadelphia National Bank, supra,* 374 U.S. at 356–357; *Brown Shoe Co.* v. *United States, supra,* 370 U.S. at 326.

Correspondent banking involves, as the district court found (J.S., App. A, p. 55), "unique production facilities, distinct customers, and specialized vendors."[53] There is, according to the government's

[51] While two Colorado country bankers testified on behalf of Bancorporation that they do not need a Denver correspondent, each in fact has one (App. 375, 379–380).

[52] See App. 189, 219–220, 231. See also App. 177–178, 191–192, 198, 201–202, 209, 378, 507, 508. Such competition is relevant in considering mergers between banks and other types of financial institutions. *United States* v. *Phillipsburg National Bank, supra,* 399 U.S. at 360.

[53] The court, however, found inconclusive the evidence with respect to whether correspondent banking is a distinct product market. It was concerned that there was no evidence that correspondent banking has distinct prices or sensitivity to price

expert witness in this case (App. 234–235), as great a synergistic effect from the clustering of correspondent banking services as from commercial banking services, for such clustering "has economic significance well beyond the various products and services involved." *United States* v. *Phillipsburg National Bank, supra,* 399 U.S. at 361.

These factors, we submit, demonstrate that correspondent banking is an economically significant line of commerce, and that the State of Colorado is an economically significant area for purposes of Section 7. Compare *Brown Shoe Co.* v. *United States, supra,* 370 U.S. at 325, with *United States* v. *Philadelphia National Bank, supra,* 374 U.S. at 357–362; see also *United States* v. *Pabst Brewing Co., supra.*

B. The Acquisition May Substantially Lessen Competition In Correspondent Banking in the State

The effect of the acquisition on the Colorado correspondent banking market would be to further a

changes. (J.S., App. A, p. 55). But this is an excessively rigid attempt to apply the submarket criteria of *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 325. There is no precise price for many services supplied to country banks because compensation usually takes the form of interbank deposits. Moreover, what is significant is not the price interrelationship between commercial banking and correspondent banking, but the customer to whom the services are supplied. The enumerated submarket criteria of *Brown Shoe* are not a fixed list of factors that must be present in every case before there can be a submarket, but only a guide to factors that may identify an "economically significant submarket." See *Reynolds Metals Co.* v. *Federal Trade Commission*, 309 F. 2d 223, 226–229 (C.A.D.C.); *Alex Corp.* v. *Federal Trade Commission*, 420 F. 2d 928, 931–932 (C.A. 6), certiorari denied, 400 U.S. 865.

trend in the state of similar acquisitions of "country" banks by Denver correspondent banks. This trend presently threatens, on the one hand, to eliminate actual competition among the Denver banks supplying correspondent services, and, on the other hand, to erect barriers to the entry into this highly concentrated market of new banks offering a full range of such services.

Bancorporation's lead bank, FNB Denver, is the largest of six offerors of Denver correspondent banking services (see pp. 6–7, *supra*). Its share of Colorado interbank deposits as of August 1970, exceeded 37 percent; the two nearest rivals each had approximately 23 percent (PX 205, App. 1304; App. 247–248; see also PX 204, App. 1303). These three organizations together thus controlled more than 83 percent of the state's interbank deposits (PX 205, App. 1304).

By the end of August 1970, the seven state holding companies, which already owned five of the six correspondent banks, had through bank acquisitions foreclosed approximately 12 percent of the correspondent banking market by joint ownership of both supplier and customer banks (PX 215, App. 1313; App. 257). Bancorporation's acquisition of the National State Bank of Boulder [54] added 2.5 percent to this figure (PX 164, App. 1240–1248; PX 217, App. 1315; App. 257–259), and its acquisition of Security State Bank in Sterling will add another 0.8 percent (PX 217, App. 1315). The acquisition of FNB Greeley would increase the

[54] See n. 9, *supra*.

figure yet another 1.2 percent,[55] making a total market foreclosure of 16.5 percent. Nor does it appear that the Colorado holding companies are content to stop there (see pp. 24–25, supra).[56]

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[55] The 1.2 percent figure includes the interbank deposits of banks already foreclosed by ownership as claimed by Bancorporation (Motion to Affirm, pp. 35–36). The figure excluding Colorado affiliates would be 1.4 percent (PX 217, App. 1315).

[56] Further holding company acquisitions are continuing to foreclose additional market shares (Motion to Affirm, pp. 34–35, n. 27). Bancorporation cites the government's failure to bring suit in these instances as illustrative of an alleged inconsistency between theory and practice; it claims that this "failure" cannot be justified on the ground that the uncontested acquisitions involve smaller banks because, in its view, the smaller banks have a greater need for the services of big banks than do larger banks. But the relative importance of a correspondent account is best measured by its size. While the district court only accepted interbank deposits as a measure of the degree of foreclosure *arguendo* (J.S., App. A, pp. 58–59), all of the objections that have been raised to their use as a measuring rod here would apply equally to the use of deposit figures in testing commercial banking mergers. What is important, in the final analysis, is the total market foreclosure and interbank deposits are sufficient to show that. See *United States* v. *Philadelphia National Bank*, *supra*, 374 U.S. at 356–357.

Bancorporation also contends that the fact that the number of potential customers for correspondent services in Colorado has increased between 1961 and 1970 demonstrates that the market is not "drying up." But, as the President of the most recent entrant into the market (Security National Bank) testified, a correspondent banking account the size of FNB Greeley's is an important one (App. 207–208); if Security National Bank were able to attract FNB Greeley's business it would double its market share. (Compare PX 205, App. 1304 with PX 190, App. 1295). It is, therefore, the foreclosure of these more substantial accounts that creates the major threats to competition.

Foreclosure of the market to competitors by acquisition of a customer may substantially lessen competition in violation of Section 7. *United States* v. *Ford Motor Co., supra; Federal Trade Commission* v. *Consolidated Foods Corp.,* 380 U.S. 592; *Brown Shoe Co.* v. *United States, supra; United States* v. *du Pont de Nemours & Co.,* 353 U.S. 586. Where a trend toward substantial foreclosure is present, acquisitions of relatively small market segments, such as the 1.2 percent here, are significant. See *e.g., Brown Shoe Co.* v. *United States, supra* at 332–334 (2 percent, 1.5 percent and 1 percent);[57] cf. *United States* v. *Aluminum Co. of America, supra* (1.3 percent). The district court held that this principle was inapplicable because it had only been applied in cases involving national, not local, markets (J.S., App. A, p. 60). But this Court has made it clear that the antitrust laws apply with the same vigor in local markets as in the larger areas. *United States* v. *Philadelphia National Bank, supra,* 374 U.S. at 357–362; *United States* v. *Phillipsburg National Bank, supra,* 399 U.S. at 358, 365.

The district court erred (J.S. App. A, p. 60) in considering the FNB Greeley acquisition in isolation, without regard to the trend in Colorado toward foreclosure of the correspondent banking market through large bank holding company acquisitions, including

[57] See also *United States* v. *Kimberley-Clark Corp.,* 264 F. Supp. 439, 446–448 (N.D. Cal.) (2 percent); *United States* v. *Kennecott Copper Corp.,* 231 F. Supp. 95, 105 (S.D. N.Y.) (.76 to 1.0 percent); *United States* v. *Bethlehem Steel Corp.,* 168 F. Supp. 576, 606 (S.D. N.Y.) (1.3 percent).

contemporaneous proposals for additional statewide acquisitions. Such evidence substantiates what must ordinarily be inferred from the evidence of a past trend—*i.e.*, that the trend will continue unless halted.[58] This evidence is relevant to the determination under Section 7 of the Clayton Act whether the particular acquisition under scrutiny may tend substantially to lessen competition in the correspondent banking market in Colorado. Cf. *United States* v. *Von's Grocery Co., supra,* 384 U.S. at 277.

CONCLUSION

The judgment of the district court should be reversed and the case remanded for further consideration under correct criteria.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
WALKER B. COMEGYS,
Acting Assistant Attorney General.
DANIEL M. FRIEDMAN,
Deputy Solicitor General.
WM. BRADFORD REYNOLDS,
Assistant to the Solicitor General.
DONALD I. BAKER,
HOWARD E. SHAPIRO,
LEE A. RAU,
Attorneys.

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[58] See generally n. 28, *supra*, and accompanying text.

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